

Michigan Supreme Court
State Court Administrative Office
Hall of Justice, P. O. Box 30048
Lansing, Michigan 48909
(517) 373-4835
John D. Ferry, Jr., State Court Administrator

Memorandum

To: Chief Circuit Judges; Chief Probate Judges; Presiding Family Division Judges
cc: Circuit Court Administrators; Probate Court Administrators and Registers;
Family Division Administrators

From: John D. Ferry, Jr.

Date: January 3, 2003

Re: ADM 2003-02 Implementation of New Michigan Court Rule on Incarcerated Parties

I. INTRODUCTION

A new Michigan Court Rule on incarcerated parties -- MCR 2.004 -- went into effect January 1, 2003. The proposal for the rule came about through the settlement agreement entered in the recent Court of Claims case, *Cain v Michigan Dep't of Corrections*, 88-61119-AZ, 93-15000-CM, and 96-16341-CM. As part of the settlement, the Department of Corrections consented not to oppose a court rule that would establish a special procedure for ensuring prisoners receive notice of court proceedings involving their minor children.

Given the wide scope of MCR 2.004, and given the various logistical issues the rule raises, courts may have questions concerning the rule's implementation. This memorandum is designed to provide guidance on implementation.

The Michigan Supreme Court amended some provisions of this rule on incarcerated parties shortly before it went into effect. A copy of the Court's order, which contains the full language of the rule as it went into effect, is located at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2001-06-122002.pdf>.

The guidance provided in this memorandum is organized around the rule's various parts, starting with the rule's numbering.

II. NUMBERING OF THE RULE

When the Supreme Court originally issued this rule on incarcerated parties, effective January 1, 2003, the rule was designated as MCR 3.220.

Since the rule concerns several types of actions outside of domestic relations, including neglect and guardianship cases, the rule is now designated as MCR 2.004 to reflect its broader application.

III. APPLICABILITY OF THE RULE

Pursuant to subrule (A), the rule applies to certain types of cases where a party is incarcerated under the jurisdiction of the Department of Corrections (DOC).

A. Types of Cases

The court rule potentially applies in any of the following types of actions:

- domestic relations actions involving minor children;
- actions involving the custody of minor children;
- actions involving the guardianship of minor children;
- actions involving the neglect of minor children;
- actions involving the foster-care placement of minor children;
- actions involving the termination of parental rights.

The court rule does not define specifically what constitutes a domestic relations action involving minor children. However, MCR 3.201 establishes Subchapter 3.200 Domestic Relations Actions, as applying to actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, Family Support Act actions, Child Custody Act actions, parenting time actions and to proceedings that are ancillary or subsequent to those actions relating to the custody, parenting time, or support of minors or a spouse or former spouse.

Since the foster-care placement of minor children is a general dispositional option under the Juvenile Code, some juvenile delinquency and other types of cases may be implicated by this rule. Since the termination of parental rights is covered generally, cases involving adoption or the safe delivery of newborns may also be implicated.

B. Incarcerated Party

If the proper type of action is before the court, then the rule will apply if a party is incarcerated under the jurisdiction of the DOC. The DOC understands the term “incarcerated” to refer to someone housed in a prison or jail. Halfway houses and other places of semi-detention within the community are not considered by DOC to be places of incarceration.

Although “party” is not defined in the rule, it would appear that the term would cover any person or entity seeking relief regarding a minor child whether designated as plaintiff, defendant, petitioner, movant, applicant, or respondent.

It is possible, although rare, for an individual to be incarcerated under the jurisdiction of the DOC and yet not be incarcerated within this state. A prisoner may be housed in a federal penitentiary when it is necessary for the inmate’s protection.

On occasion, a person is incarcerated in Michigan and yet is not under the jurisdiction of the DOC. One scenario where this occurs is when someone convicted elsewhere is placed in a Michigan prison through the federal witness protection program.

IV. REQUIREMENTS ON A PARTY SEEKING AN ORDER REGARDING A MINOR CHILD

When the action type and incarceration requirements under subrule (A) are fulfilled, then, pursuant to subrule (B), a party seeking an order regarding a minor child has specific duties. These duties apply any time a party seeks relief regarding a minor child.

A. Contacting DOC

According to subrule (B)(1), the party is to contact the DOC to confirm incarceration and the incarcerated party's prison number and location. One way this can be done is through accessing the Offender Tracking Information System (OTIS) on the DOC's website: <http://www.state.mi.us/mdoc/asp/aboutotis2.asp>. Another option would be to contact the MDOC Central Office, Records Office at 517-373-0284. By "prison number" the rule refers to the number assigned by the DOC to the prisoner. On OTIS, this number is referred to as both "MDOC Number" and "Offender Number."

It is unclear whether a court or a friend of the court (FOC) is to be considered a party under the rule when it seeks an order regarding a minor child on its own motion. If the court or FOC is requesting an order under the rule, it should determine the status of one or more individuals before initiating proceedings. However, in domestic relations cases involving children, the parties to the case have a statutory obligation to notify the FOC of changes in their addresses and employment. Moreover, the Data Warehouse should disclose prisoner information to the FOC when a person has a case with the FOC. Hence, the FOC should be aware of the DOC status of a person without the need to take additional action to make the determination.

Notwithstanding the statutory requirements, data interfaces, and any standing order of the court, a person may be moved within the DOC system and the new address may not be reported to the court or FOC. Hence, it may be necessary for a court or FOC, to take additional action to confirm the location of a prisoner. What additional steps a court or FOC should take to confirm incarceration is a question to be answered within each jurisdiction.

B. Service and Proof of Service

Pursuant to subrule (B)(2), the party must serve the incarcerated party with the petition or motion and must file proof of service with the court. Since a complaint may also seek an order regarding a minor child, and since the rule appears intended to cover any situation where an order regarding a minor child is sought, this service requirement is best read also to apply to relevant complaints.

C. Filing with the Court

According to subrule (B)(3), the party must file with the court the petition or motion (or complaint), including in it the following information:

- a statement that a party is incarcerated;
- the party's prison number and location;
- a statement in the caption of the petition or motion indicating that a telephonic hearing is required by MCR 2.004.

Relevant SCAO-approved forms are not designed for inclusion of the above information. If an SCAO-approved form is used in a situation implicating MCR 2.004, we suggest that the party manually add the above information before filing the document with the court.

When identifying a prisoner's location, a mailing address for the prison should be included for purposes of serving orders and notice of future requirements on the facility where the prisoner is incarcerated. If using OTIS, the mailing address of the facility is available by clicking on the facility's name after finding the prisoner information.

V. ISSUING AN ORDER TO THE DOC OR FACILITY

Pursuant to subrule (C), when a party has met the requirements of subrule (B), the court is to issue an order requesting the DOC, or the facility where the person is incarcerated, if the person is not in a DOC facility, to allow the prisoner to participate via telephone in a hearing or

conference with the court (or its designee). Non-DOC facilities which may be implicated by this rule include the following:

- Out-of-state prisons in which a prisoner under the jurisdiction of DOC has been placed;
- The Michigan Youth Correctional Facility at Baldwin;
- Huron Valley Center.

A. The Order

According to subrule (C), the order is to include the following additional information:

- the date and time for the telephonic hearing;
- the prisoner's name and prison identification number.

The SCAO has devised an SCAO-approved form (MC 286) that courts may use in issuing this order. This new form is attached. The form may also be viewed on the SCAO website at <http://www.courts.michigan.gov/scao/courtforms/general/mc286.pdf>.

The court is to serve the order on the parties and on the warden or supervisor of the facility where the incarcerated party resides. The manner of service is not specified in the rule. MCR 2.107 generally covers service and filing of pleadings and other papers.

B. The Telephone Call

Pursuant to subrule (C), the telephone call is the means by which the prisoner can participate with the court (or the designee of the court) in a hearing or conference. The rule specifically indicates that this hearing or conference may be "a friend of the court adjudicative hearing or meeting." FOCs do not hold hearings or adjudicate on their own. However, the FOC may initiate proceedings that result in adjudicative hearings or meetings. Examples of proceedings that occur as a result of FOC actions include:

- Referee hearings
- Joint meetings after which the person conducting the joint meeting makes a recommendation for an order.
- Meetings with an investigator after which the investigator makes a recommendation for an order.

The rule requires the court to request that the DOC or the facility allow the prisoner to participate in a hearing or conference via "a noncollect and unmonitored telephone call." The rule does not specify what "unmonitored" means; however, the DOC has interpreted unmonitored to mean no recording of the content.

In specifying that the court is to request the DOC or the facility to allow the prisoner to participate via telephone, the rule does not indicate who is to place the call and pay for it. However, the understanding following the settlement agreement in *Cain* was that the DOC would be making the call. This understanding does not prohibit the court from determining that one or both of the parties should be responsible for the cost of the call.

One concern voiced by the DOC, though, has been that in the current situations where such telephone calls are made it is often the case that the court is not prepared to conduct the hearing or conference when the prison or other facility calls. This sometimes results in the prison making multiple calls and occasionally requires prisoners to be held outside their cells for unacceptably long periods of time. As courts and prisoner facilities work out the calling arrangement that is most efficient and effective, the court should implement a policy that court staff make an initial call to the facility to indicate readiness for the hearing, and then having the facility shortly thereafter make the call which allows for the prisoner's participation.

VI. PRISONER IDENTIFICATION ON ENVELOPE

Pursuant to subrule (D), any court documents or correspondence mailed to the incarcerated party concerning any matter covered by MCR 2.004 must include the prisoner's name and prison number on the envelope.

VII. PURPOSE OF THE TELEPHONE CALL

The rule envisions an incarcerated party participating with the court in a hearing or conference via a telephone call. Pursuant to subrule (E), the purpose of this telephone call is similar to a scheduling conference. The court must determine:

- Whether the incarcerated party has received adequate notice of the proceedings and has had an opportunity to respond and to participate.
- Whether counsel is necessary in matters allowing for the appointment of counsel to assure that the incarcerated party's access to the court is protected.
- Whether the incarcerated party is capable of self-representation, if that is the party's choice.
- How the incarcerated party can communicate with the court or the friend of the court during the pendency of the action, and whether the party needs special assistance for such communication, including participation in additional telephone calls.
- The scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate.

The rule does not require appointment of counsel in matters for which appointment is not already required by law. Because the rule does not specify that the prisoner is entitled to additional telephone calls after the first call, the court should make appropriate arrangements with the prison which may include requiring one or both of the parties to pay the costs of any future calls.

VIII. THE COURT'S ABILITY TO GRANT RELIEF

Pursuant to subrule (F), and except in specifically identified situations, a court may not grant the relief requested by a party as described in subrule (B) if the incarcerated party has not been offered the opportunity to participate in proceedings regarding the minor child. This proscription against the court granting relief does not apply in either of two situations:

- the incarcerated party actually participates via telephone in proceedings regarding the minor child; or
- the court determines that immediate action is necessary on a temporary basis to protect the minor child.

A court may find that the latter situation holds in cases such as where a child is removed from the home for alleged abuse or neglect, thereby necessitating a preliminary hearing be held within 24 hours, or for issuing an ex parte or temporary order necessary to allow a party to provide medical or remedial care for a child on an emergency basis, or for the protection of a party and child in cases involving domestic violence..

IX. SANCTIONS

According to subrule (G), if a court finds that an attempt was made to keep information about the case from an incarcerated party in order to deny that party access to the courts, the court may impose sanctions. The rule does not specify what sanctions may be imposed. In other court rules (e.g., MCR 2.114 and 2.625) the assessment of costs is allowed while the assessment of punitive damages is not.

X. QUESTIONS

Questions on this memorandum and on the implementation of the rule may be directed to Steve Capps, at 517-373-9318 or cappss@courts.mi.gov.